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Alabama: The devil fools with the best-laid plans*

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*The Supreme Court of New Zealand in **Xu v IAG New Zealand Ltd** has decided by a bare majority that the purchaser of a damaged building who has also taken an assignment of the insurance claim relating to that building is precluded from recovering anything more than the reduced value of the building. If the policy also provides coverage for rebuilding costs, the assignee cannot recover such costs. However, the position of the assignee could have been so much worse had the insurers refused all payment to the assignee on the basis that the assured's insurance claim had been satisfied by payment of the purchase price. Could the insurers have done so? The question turns on the correct interpretation of the decision of the House of Lords in **Burnand v Rodocanachi**, which arose out of the activities of the Confederate cruiser Alabama during the American Civil War. This article examines the complex yet fascinating historical background of **Burnand v Rodocanachi**, and highlights the limitations of the decision.*

I Introduction: Subrogation and indemnity

On 22 September and 24 December 2010, and again on 4 February and 13 June 2011, the city of Christchurch was rocked by devastating earthquakes. The damage was immense, and the massive number of claims — some 750,000 — far exceeded the physical capacity of the insurance industry to process claims. As a result, many people were for some years thereafter forced to live in damaged properties, uncertain whether repairs could be effected and, if so, when. Unsurprisingly, a number of those affected decided that it would make sense to sell their properties in their damaged state but for their value as if they had not been damaged, and to assign to the purchasers the benefits of buildings insurance relating to those properties. Some of the purchasers were private persons, others were developers. By that means the sellers would receive full value as if for undamaged properties, and purchasers would be able to rebuild or at least receive cash equivalent at the expense of insurers.

That straightforward and sensible scenario raised an important but seemingly unresolved question. The sale to the purchasers of damaged buildings could not be accompanied by an assignment of the policies themselves, as it is settled law that while a claim on an insurance policy constitutes a chose in action, an insurance policy is a personal contract whose

* Borrowed from Neil Young, 'Alabama', from the timeless *After the Goldrush* (1970) album.

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performance rests upon the characteristics of the parties in much the same way as an employment contract. They are accordingly not assignable.[1] There is no objection to assigning the proceeds of an insurance claim in the same way as any other action for damages,[2] but such an assignment is of the assured's own rights. So the assignee's claim can only be for the assured's loss. The difficulty is that property insurance provides only an indemnity, and the insurer is the indemnifier of last resort. Thus, if the assured's loss has been made good from another source, the insurer is discharged from liability to that extent. That is an obvious point: if my car is damaged by the negligence of another driver and he offers to pay for the repairs, plainly I have no claim against my motor insurers because I have suffered no loss.

The unfortunate consequence from the interaction of these principles would seem to be that if the owner of a damaged building has received the undamaged price from a purchaser, any attempt by the purchaser to bring a claim against the insurers can be met by the defence that the owner has suffered no loss and therefore the insurance claim is worthless (at least to the extent of the assignee's payment). To date, insurers have not relied upon this as a defence to claims by assignees. However, insurers have to date failed to take the point, and instead have relied upon a more limited matter. Most property policies offer 'indemnity' cover (loss of value) and, for an additional premium, 'indemnity plus' cover (actual rebuilding cost). Insurers have objected to assignees recovering actual rebuilding cost, given that they may find (and often have found) themselves dealing with developers who have a keen interest in maximising the figures in their favour and who of course were unknown to the insurers when they assessed the moral hazard relating to the original policyholder. Insurers have managed to escape from the assignment of 'indemnity plus' claims by pointing to typical policy wording that 'if following loss or damage ... you restore your Home, we will pay the cost of restoring it to a condition as nearly as possible equal to its condition when new', and arguing that 'you' means the assured and not the assignee. Thus, while insurers have been prepared to pay indemnity, they have not been willing to pay indemnity plus. The indemnity plus issue was recently tested in the Supreme Court of New Zealand in *Xu v IAG New Zealand Ltd* ('*Xu*'),[3] and the Court by a 3:2 majority confirmed that authority — *Bryant v Primary Industries Insurance Co Ltd* ('*Bryant*')[4] — dating back 30 years and denying the right to an assignee to recover indemnity plus, should be confirmed. The majority was particularly concerned not to disturb the settled principle upon which policies had been issued ever since *Bryant*, and noted that alternative and less restrictive wordings were also available. They were also concerned with the moral hazard faced by insurers in having to deal with a stranger in the claims process. The minority saw no reason to construe 'you' as imposing a

1 There is a statutory exception for marine policies in *Marine Insurance Act 1906* (UK) s 50, and a common law exception for life policies first adopted in *Dalby v India & London Life Assurance Co* (1854) 3 CB 365.

2 The proper classification of a claim under an insurance policy: see the detailed discussion by the New South Wales Supreme Court in *Globe Church Inc v Allianz Australia Insurance Ltd* [2018] NSWSC 1367.

3 [2019] NZSC 68.

4 [1990] 2 NZLR 142 ('*Bryant*').

personal obligation, felt that the moral hazard was all but eliminated by the insurers' right to control the reinstatement process and were unimpressed with the argument that certainty mattered very much in the present context.

It is to be stressed that it was not suggested to the Supreme Court that insurers could, if they so wished, deny even indemnity claims to an assignee who had purchased a damaged building and in tandem taken an assignment of the insurance claim to relating to it. But could they? The answer is to be found in a different era and indeed in a different world.

II The Spanish reprisal cases

Up to the early part of the 19th century the High Seas were dangerous places. Wooden vessels were susceptible to the natural agitations of the oceans and to the unwanted attentions of pirates. In time of war between European nations, which was, with a few breaks, all but continuous for a millennium up to the fall of Napoleon in 1815, the dangers were massively exacerbated. The embryonic laws of nations, faithfully applied by the admiralty courts of even the most bitter enemies, had recognised that disrupting enemy trade was a perfectly legitimate tactic. Vessels and cargoes belonging to enemies could be intercepted, seized and taken to the captor's own territory where the subject matter would face condemnation proceedings in a prize court. Neutral vessels were immune from seizure, but that immunity did not extend to their cargoes if either enemy-owned or designed for hostile use ('contraband of war'). In the Napoleonic period the rights of neutrals were, as described below, all but eroded by legislative measures adopted by Britain, France and the US.

In England, vessels and cargoes taken at sea by hostile acts belonged to the Crown. However, to encourage takings at sea it was settled practice for the Crown to relinquish its rights in favour of the captors. At the start of each war Britain passed a Prize Act[5] which authorised the issue of an order in council setting out how the proceeds of any prize were to be allocated as between the crew of a royal navy captor. Admirals took 1/8 and many of them prospered magnificently on the back of the efforts of their hardworking crews whose share was far smaller. Disputes on allocation regularly reached both the common law courts and the admiralty court, raising issues such as whether there had been joint capture and whether the army was entitled a share of the proceeds when conducting a joint operation with the navy. Admiral Nelson himself was not above litigating on the matter.[6] However, of equal importance was capture by privateers, namely, armed merchant vessels operating under state licence. In England, authorisation could be obtained from the Crown under letters of marque, issued to individual vessels on the outbreak of war, and under letters of reprisal, permitting a vessel to seize the property of a nation by way of retaliation for losses inflicted upon a particular merchant by vessels of that nation. Letters of reprisal could also be general, aimed at any property of a specified nation. The earliest traceable letter of reprisal issued in England is generally thought to be that obtained by Bernard D'Ongressill,

5 The earliest was in 1662, 13 Car II, c 9. The modern law is contained in the *Naval Prize Act 1864*.

6 *Lord Viscount Nelson v Tucker* (1803) 4 East 238; 102 ER 821 is illustrative of the numerous decided cases.

whose property was seized by Portuguese adventurers. He was granted licence by Edward I for the purpose of 'marking the men and subjects of the kingdom of Portugal' for a 5-year period 'to mark, retain and appropriate' Portuguese property until his loss of £700 had been made good.[7] Letters of marque and reprisal were abandoned by most of the major seafaring nations by the Paris Declaration of 1856 in the aftermath of the Crimean War although — crucially to this narrative — the United States at that point refused to sign up to an arrangement that, although eliminating privateering, left neutral vessels carrying enemy goods at the mercy of warships. Privateers were entitled to keep all of the proceeds, although allocation was a matter of contract between the owners and their crews. The proceeds of prizes were in time of war a far greater incentive than wages to serve in the merchant navy.

Anglo–Spanish relations in the first half of the 18th century were fraught. The War of the Spanish Succession dragged on for a decade before the *Treaty of Utrecht* in 1713 brought an end to attempts to unify the French and Spanish thrones and saw Gibraltar and Minorca ceded to Britain. The short-lived peace was ruptured by Spanish aggression in Sardinia and Sicily in 1717, leading to the War of the Quadruple Alliance and peace again in 1720. A further skirmish occurred in 1727 with a Spanish attempt to retake Gibraltar, rebuffed by the British Navy, and ownership of Gibraltar was confirmed by the *Treaty of Seville* in 1729. Although the next decade did not see the resumption of open warfare between Britain and Spain, there were border tensions between their respective holdings in Georgia and Florida, as well as frequent disputes over trading rights in the Caribbean. In April 1731 Captain Robert Jenkins' vessel was arrested off Florida and his ear was cut off as a punishment for smuggling. Seven years later, with encounters over Caribbean trade reaching significant numbers, Britain was looking for an excuse for war, and in 1838 in hearings in the House of Commons the tale of Jenkins' ear was put to good use. War against Spain was declared in April 1739 and reprisals were ordered against Spain in July 1739. The war dragged on inconclusively, mainly through naval engagements in the Caribbean and off the Spanish–South American colonies, until 1750. Some 300 British prizes were taken in every year.

On 18 June 1741 George II issued a further proclamation[8] condemning 'the depredations and unjust seizures by Spanish ships contrary to the law of nations and in violation of the treaties between Great Britain and Spain, whereby British subjects had sustained great losses'. Reprisals were ordered against ships, goods and subjects of the King of Spain, with the proceeds going to those who had suffered losses at Spanish hands, to be distributed by Commissioners for Distribution. Lloyd's underwriters had paid for most of the losses, and once funds from the Commissioners began to flow, the underwriters sought to claim them for their own benefit. That was the background to *Randal v Cockran* ('*Randal*')[9] and *Blaauwpot v Da Costa* ('*Blaauwpot*').[10] In *Randal* Lord Hardwicke LC described the underwriters'

7 RG Marsden, *Documents Relating to Law and Custom of the Sea* (Navy Records Society, 1205–1648) vol I, 38.

8 The text is appended to the judgment of the House of Lords in *Burnand v Rodocanachi* (1882) 7 App Cas 333 ('*Burnand*'), of which much more below.

9 (1748) 1 Ves Sen 98; 27 ER 916 ('*Randal*').

10 (1758) 1 Eden 130; 28 ER 633 ('*Blaauwpot*').

claim as being based on the 'plainest equity' and rejected the argument that the payments were for anything other than compensation for losses suffered by the merchants. A similar argument in *Blaauwpot*, classifying the Commissioners' payments as a gift and to be left out of account, was brusquely rejected. The Spanish conflict thus settled the law: insurers who paid insured losses, could take for themselves any sums later coming to policyholders for the purpose of diminishing those very losses.

III The American Revolutionary War

Even those most tightly wrapped in the Stars and Stripes would be unable to deny the contribution of France, Spain and Holland to the success of the American Revolution in securing the independence of the 13 colonies from Britain in 1783. The onset of the Revolution in 1775, the result of political mismanagement, impressment, the enforcement of tax rules and restrictions on colonial trade other than by British-owned vessels with British crews imposed by the English *Navigation Act 1660*, was greeted with glee by France: after all it is a close call to determine whether the preceding 7 centuries had seen more or fewer years of peace than war between Britain and France. The Seven Years' War in Europe, running from 1756 and prompted by the territorial ambitions of Frederick of Prussia, subsumed the preceding 2 years of conflict in the American theatre between Britain and France. Britain emerged in 1763 with possession of Canada and, following the Battle of Quiberon Bay in November 1759, dominance of the seas. France still hurt.

The onset of the Revolution was the perfect stage for French opportunism: the irony of the most absolute monarchy in Europe lending support to the very revolutionary tendencies that it dreaded was to have its own bloody consequences in 1789. In the meantime, money and supplies flowed to the rebels, and support was formalised in the *Treaty of Amity and Commerce* and *Treaty of Alliance* of 6 February 1778 once it had become clear from the British defeat at Saratoga in the autumn of 1777 that the old enemy was on the run. The Treaties were defensive only, and granted France the right to bring enemy prizes to American ports and prize court, the right to have warships and privateers fitted out in American shipyards and the right to trade in American ports. Those concessions were necessarily denied to the enemies of France.

French intervention, followed in short order by that of Spain and Holland, spread the conflict to European waters and provided a substantial distraction to the British war effort on the American mainland. The Prize Act of 1776,[11] authorising reprisals against American property, was extended to French vessels and goods by order in council dated 28 July 1778 and a further Prize Act in 1779.[12] General reprisals were ordered against Spanish vessels by order in council dated 18 June 1779 and against Dutch vessels by order in council dated 20 December 1780, and the 1779 Act was extended to Spanish and

11 16 Geo 3, c 5.
12 19 Geo 3, c 67.

Dutch property.[13] The end of the War heralded a short period of peace in Europe but, crucially, not the end of the US–French Alliance of 1778.

IV The French Wars

The French Revolution of July 1789 attracted the intellectual support of key American figures, notably Thomas Jefferson, who had served as Minister to France for the latter part of the War of Independence. However, the French declaration of war of 1 February 1793 on much of Europe, including Britain, posed an immediate problem for President George Washington whose second term commenced on 4 March 1793. His cabinet was divided in its sympathies, Jefferson heading the pro-French (and anti-Federalist) faction and Alexander Hamilton championing the British (and pro-Federalist) cause. What, then was to become of the Treaties of 1778, which effectively sided America with France, albeit not for the purposes of aggression? Washington chose a middle line between the opposing views. On 8 April 1793 he issued a proclamation stating that 'the duty and interest of the United States require, that they should with sincerity and good faith adopt and pursue a conduct friendly and impartial towards the belligerent powers', warning US citizens 'to avoid all acts and proceedings whatsoever which may in any manner tend to contravene such disposition'. US citizens were denied the right to enlist and warships or privateers could not be fitted out in US shipyards.

Coincidentally, on the same day as the issue of Washington's proclamation, French Minister Edmond Genet arrived at Charleston. His task was to secure a military alliance, enabling France to retake Canada from Britain and Florida from Spain. However, he swung into more immediate action and embarked upon a course of 'conduct unsurpassed for effrontery, even in a generation which abounded in instances of flagrant contempt for the rights of nations'.[14] He issued letters of marque to French and American privateers, he armed US vessels as privateers and within 6 months his activities had led to some 50 British prizes being taken to US ports for condemnation in accordance with the 1778 Treaty. Genet was warned by Washington about his behaviour, forbidden to fit out vessels to cruise against British interests, ordered to pay compensation to British shipowners and US ports were closed to French prizes. US privateering was successfully brought to an end by the beginning of August 1793,[15] but Genet was unbowed. Although US prize courts were closed to France, Genet adopted the device of designating the various French consulates in the US as French prize courts. His unlawful[16] order was revoked in December 1793 when he was recalled to France.[17]

Genet's activities, and Washington's desire to risk further conflict — armed or trade — with Britain, led to the (politically heavily contested) passing of

13 Unlike France and Spain, war was never formally declared against the Dutch.

14 Grosvenor Porter Lowrey, *English Neutrality: Is the Alabama a British Pirate?* (Henry B Ashmead, 1863) 3.

15 See, eg, *Talbot v Jansen*, 3 US 133 (1795).

16 *Glass v The Betsey*, 3 US 6 (1794).

17 He refused to go, subsequently married the daughter of New York Governor George Clinton and, after her death, the daughter of Postmaster General Samuel Osgood. His demise in 1834 was on Bastille Day, 14 July.

the *Neutrality Act 1794* (US). By ss 1–2, US citizens were forbidden from accepting foreign commissions against a nation at peace with the US. By s 3, a series of offences in relation to shipbuilding were laid down, most importantly fitting out and arming, or being concerned with the furnishing, fitting out, or arming, of any ship or vessel with intent that it should be employed in hostile action against a nation with which the US was at peace.[18] Section 4 created a further offence of increasing, augmenting[19] or procuring to do so, the force of any ship of war, cruiser, or other armed vessel, which, at the time of her arrival within the United States was in the service of a foreign state at war with another state at peace with the US. The shipbuilding offences related only to conduct within the US.[20] The most important limitation on the *Neutrality Act 1794* was that it did not prevent the manufacture and sale of a warship. The law of nations allowed neutral trade with belligerents, and a warship was no more than an article of commerce: what was prohibited was fitting out a vessel for hostile use.[21] That fine distinction was to have important consequences half a century after the legislation was passed.

It is possible to skim over the events of the following 20 years. The French Revolutionary Wars petered out in 1802, but within a year Napoleon's assumption of power heralded in a further dozen years of conflict in Europe. In the early part of the Napoleonic Wars the US exercised its rights as a neutral to trade with the belligerents, but its efforts were thwarted by two extensions to the law of prize adopted by the British Admiralty Court. First, it was regarded as an infringement of neutrality for a vessel to conduct trade between ports in time of war when those ports were closed to it in time of peace: that effectively precluded US vessels from entering French colonial possessions in the Caribbean to carry cargoes to France. The principle, often referred to as the 'Rule of 1756' whereby Britain warned off neutral Dutch vessels from carrying to and from French possessions in the Caribbean under French licence when they were not permitted to do so in time of peace, was first put into extensive use in the Napoleonic period. Secondly, the Admiralty Court developed what has become known as the 'doctrine of continuous voyage', which put an end to evasion of the Rule of 1756 by the device of collecting a cargo from a French colony in the Caribbean, transporting it to a US port, unloading and reloading on a US vessel and then undertaking what was ostensibly a neutral voyage to France.[22]

This was all coupled with Napoleon's adoption of the Continental System in the form of the Berlin Decree of November 1806 and the Milan Decree of March 1807 that announced a blockade of British ports and threatened the arrest of any neutral vessel infringing the blockade. Britain responded with

18 *United States v Guinet*, 2 US 321 (1795).

19 The meaning of 'augmentation' gave rise to a series of borderline cases. See *Moodie v The Cathcart* (1794) Bee's Reports 292 (addition of cannon). Contrast: *Moodie v The Brothers* (1793) Bee's Reports 76 (minor modifications); *United States v Quincy*, 6 Peter's Am Rep 445 (minor modifications); *Moodie v The Phoebe Anne*, 3 US 319 (1796) (replacement of the crew of a French privateer).

20 See, for a blatant contravention, *Williamson v The Brig Betsy* (1793) Bee's Reports 67. Contrast *La Vengeance*, 3 US 297 (1796), where the conduct was that of passengers arming themselves with muskets.

21 *Moodie v The Alfred*, 3 US 307 (1796).

22 *The Immanuel* (1799) 2 C Rob 186; *The Maria* (1805) 5 C Rob 365.

orders in council requiring all neutral vessels trading in Europe to do so via British ports and also imposing a notional blockade on all French ports. The damage to US shipping was such that Jefferson, President at the time, reacted by imposing a plague on both houses with the *Embargo Act of 1807* (US) barring trade with both Britain and France. This measure remained in force for 2 years, to be replaced by the more severe *Non-Intercourse Act 1809* (US). These measures were something of a self-inflicted wound. One lasting effect of the *Embargo Act* of interest to insurance lawyers is the decision in *Livie v Janson*,[23] in which an American vessel, insured at Lloyd's under a policy 'warranted free from American condemnation', ran aground at night off New Jersey in the course of an embargo-busting voyage from New York to London. She was on the rocks in a damaged state for 7 hours, and at first light was seized by the authorities. With seizure excluded, the assured sought to recover for a partial loss in the form of the damage. The claim was rejected on the ground that a total loss subsumed an earlier unrepaired partial loss, a ruling codified by s 77 of the *Marine Insurance Act 1906* (UK), in terms of 'merger'. The point was destined to vex the New Zealand courts 200 years later, in the form of claims for damage to buildings inflicted by the consecutive earthquakes in 2010–11, culminating in total destruction before repairs from earlier events could be effected. The initial ruling by the Supreme Court[24] that merger had no application to non-marine cases was almost immediately sidestepped by the New Zealand Court of Appeal[25] in focusing on the point that the principle of indemnity precluded recovery for the same loss so that unrepaired damage was irrecoverable.

V The Spanish colonies

Simmering resentment of the British treatment of American trade, along with Britain's assertion that it was entitled to impress American subjects into the British Navy on the ground that they remained British subjects, erupted in armed conflict between Britain and the US in the 1812–14 War. The US *Neutrality Act 1794* was duly suspended. The rather pointless conflict proved disastrous for US prestige, with Britain seizing and burning US government buildings, notably the White House, on 24 August 1814. Peace was restored with the *Treaty of Ghent* on 24 December 1814, news of which failed to reach Louisiana in time to prevent an abortive British assault on New Orleans, repulsed by reputed Indian fighter General Andrew Jackson on 8 January 1815. The most successful engagement for the US in the conflict was thus achieved in time of peace, but nevertheless cemented Jackson's reputation in his successful campaigns for the presidency in 1829 and 1833.

In the meantime, in Europe, France had capitulated on 31 March 1814. Napoleon was banished to the Island of Elba, and Britain put in place a strategy to isolate France. That was in part achieved by the *Anglo–Spanish Treaty of Friendship and Alliance*, signed in Madrid on 5 July 1814. While negotiations for a wider European settlement were underway, Napoleon

23 (1810) 12 East 648.

24 *Ridgecrest NZ Ltd v IAG New Zealand Ltd* [2015] 1 NZLR 40.

25 *QBE Insurance (International) Ltd v Wild South Holdings Ltd* [2015] 2 NZLR 24.

slipped out of Elba on 26 February 1815, returned to France and mustered sufficient support for a final but unsuccessful stand at Waterloo on 18 June 1815. Peace was formally restored by the *Treaty of Paris*, signed on 20 November 1815.

One outstanding problem remained for both the US and Britain, in the form of the open revolt of the Spanish colonies in Latin America. As far as the US was concerned, the end of the 1812–14 War found many privateering vessels fitted out to pursue British prizes but now with nothing to chase, and many veterans of the War were unable to find employment. That combination led to mercenary action against Spain, conduct that the US was determined to stamp out. After effecting temporary measures in 1817, the US passed a revised *Neutrality Act* in April 1818. This repealed and replaced the 1794 Act with extensions in four respects: a new offence of fitting out or arming a vessel with intent that it was to be employed against the US itself was created; US citizens who were owners or consignees of an armed ship sailing out of a US port were to provide security in the form of a bond to the US of double its value, as security for not committing hostilities against any friendly nation; collectors of customs could detain vessels about to leave the US where 'the cargo shall principally consist of arms and munitions of war, when the number of men shipped on board or other circumstances shall render it probable that such vessel is intended to be employed'; and the Act was extended from wars between nations to insurrections in any colony.

The new legislation was rapidly tested, and produced two decisions vital for our purposes. In *The Gran Para*[26] Marshall CJ upheld the condemnation of the warship 'Irresistible', which had been armed and manned in Baltimore, and then sent to Buenos Aires where she was to cruise against Spain. The Supreme Court confirmed the distinction between equipping an existing vessel for war against a friendly nation, and manufacturing an article of commerce, stating that '[t]here is nothing resembling a commercial adventure in any part of the transaction. The vessel was constructed for war, and not for commerce.' The device of commissioning her after she left the US was a transparent ruse and 'a fraudulent neutrality, disgraceful to our own government, and of which no nation would be the dupe'. The point was taken up by Story J in *The Santissima Trinidad*,[27] a claim by the Spanish Government to recover cargoes taken from two Spanish ships by two vessels captained by US masters, fitted out for warlike purposes in US shipyards and then supplied South American colonies at war with Spain. The Supreme Court was satisfied that the vessel had been augmented in the US, but it was again recognised that there could not have been any objection to a vessel built as an article of commerce and then sent on a commercial voyage to find a buyer. Story J stated that

> there is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit; and which only exposes the persons engaged in it to the penalty of confiscation.[28]

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26 20 US 471 (1822).
27 20 US 283 (1822).
28 Ibid.

The US reaction to the Spanish problem was reflected in Britain. It was fundamental to continuing peace in Europe that France should be surrounded by powerful buffer states, Spain being essential to the plan. Spain could not be diverted by its colonial conflicts. The 1814 Madrid Treaty recognised the point, promising that Britain would 'take the most effectual measures for preventing [the subjects of His Catholic Majesty] from furnishing arms, ammunition, or any other warlike article to the revolted in America' Recognition of the Treaty was formalised in the British *Foreign Enlistment Act 1819*, a measure hotly contested in Parliament on the ground that the Spanish decline had gone too far to be halted and that it was wrong to impose restrictions on the activities of British subjects. The 1819 Act was based on the US *Neutrality Act 1794*, and was designed 'to prevent the Enlisting or Engagement of his Majesty's Subjects to serve in a Foreign Service, and the Fitting out or Equipping, in his Majesty's Dominions, Vessels for Warlike Purposes, without his Majesty's Licence'.

British subjects were by s 1 banned from accepting any military or naval commission to engage in hostilities against a nation friendly to Britain. More importantly, by s 7 it was an offence for any person:

> to equip, furnish, fit out, or arm, or attempt to endeavour to equip, furnish, fit out, or arm, or procure to be equipped, furnished, fitted out, or armed, or shall knowingly and, assist, or be concerned in the equipping, furnishing, fitting out, or arming of any ship or vessel, with intent or in order that such ship or vessel shall be employed in the service of any foreign ... state.

This was supplemented by s 8, under which any person:

> by adding to the number of the guns of such vessel, or by changing those on board for other guns, or by the addition of any equipment for war, increase or augment, or procure to ne increased or augmented, or shall be knowingly concerned in increasing or augmenting the warlike force of any ship or vessel of war or cruiser, or other armed vessel, which at the time of her arrival in any part of the United Kingdom, or any of his Majesty's dominions, was a ship of war, cruiser, or armed vessel in the service of any ... state

committed an offence. These offences thus corresponded to those of fitting out and augmenting in the US 1894 and 1818 Acts, but, crucially, there was no equivalent power to that in the 1818 Act allowing the authorities to prevent a vessel leaving a British port on suspicion. The meaning of the 1819 Act was never seriously tested in the period up to the American Civil War.[29]

VI The American Civil War and British neutrality[30]

The secession of southern states from the Union following the election of Abraham Lincoln as President in November 1860, and the declaration of the

29 The only reported instance of its use was in *Macnamara v Devereux* (1825) C P Coop 489; 47 ER 611, in which a claim for payment for the supply of equipment to Colombian rebels was rejected on the grounds of illegality under the 1819 Act. The measure was referred to in *Dobree v Napier* (1836) 1 Bing NC 781; 132 ER 301, but nothing turned on it.

30 Montague Bernard, *A Historical Account of the Neutrality of Great Britain during the American Civil War* (Longman, Green, Reader, and Dyer, 1870); Stephen C Neff, *Justice in Blue and Gray: A Legal History of the War* (Harvard University Press, 2010).

Confederacy on 20 February 1861 created a series of dilemmas for Britain, which did not wish to be dragged into the conflict[31] and which also wished to maintain the freedom of the seas for its merchant vessels. It will be recalled that the US had refused to sign up to the international outlawing of privateering agreed in Paris in 1856. On 6 May 1861 the Confederate Congress passed an Act 'recognising the existence of war between the United States and the Confederate States, and concerning letters of marque, prizes, and prize goods'. President Jefferson Davis was thereby authorised to issues letters of marque and general reprisal against enemy property, with neutral vessels being spared search and seizure unless carrying contraband of war. The Union for its part had on 15 April 1861 announced a blockade of Confederate ports, thereby rendering liable to arrest any neutral vessel breaking the blockade. Britain's reaction was — with the advice of the law officers, including Solicitor-General Roundell Palmer (later ennobled as Lord Selborne, the architect of the Judicature Acts 1873 and 1875) — to issue a Neutrality Proclamation on 13 May 1861. The Proclamation did not recognise the Confederacy as a nation but instead accepted Confederate belligerent status, and ordered British subjects 'to observe a strict neutrality in and during the aforesaid hostilities, and to abstain from violating or contravening either the laws and statutes of the realm in this behalf, or the law of nations in relation thereto, as they will answer to the contrary at their peril'. Specific reference was made to the observation of the terms of the *Foreign Enlistment Act 1819*.

This response disappointed the Confederacy's hopes of recognition, and the Union's hopes that belligerent status would be refused so that every act of seizure at sea would constitute piracy rather than privateering. The former was a forlorn hope. The latter was effectively precluded by Lincoln's declaration of the blockade, in that such a measure could not be recognised under the law of nations[32] in the absence of a war. The Union continued to press the British Government to go further and to forbid British citizens from trading with the Confederacy, but Prime Minister Lord Palmerston steadfastly refused to do so. The legality of such trade was tested in *Ex parte Chevasse; Re Grazebrook*,[33] in which the House of Lords refused to strike down an agreement to run the Union blockade. It must have been galling for the US to find the words of Story J in *The Santissima Trinidad* to be used as justification by Lord Westbury:

> In the view of international law the commerce of nations is perfectly free and unrestricted. The subjects of each nation have a right to interchange the products of labour with the inhabitants of every other country. If hostilities occur between two nations and they become belligerents, neither belligerent has a right to impose, or to require a neutral Government to impose, any restrictions on the commerce of its subjects.

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31 The closest it came was the unfortunate Trent affair, dragging on from October to December 1861 and concerning the taking from a British vessel of two Confederate envoys headed for England. They were ultimately released, albeit with a defiant statement of justification by Secretary of State William Seward.

32 As by then enshrined in the *Paris Declaration Respecting Maritime Law* of 1856.

33 (1865) 4 De G J & S 655, 658. See also *The Helen* (1865–67) LR 1 Ad & El 1.

On 1 June 1861 Britain issued an order preventing both Union and Confederate privateers and warships from bringing their prizes into British ports or the ports of any British possessions or colonies. British neutrality was further bolstered by an order dated 31 October 1862 whereby: no insurgent warship or privateer would be allowed into the Bahamas other than by reason of 'stress of weather'; insurgent warships and privateers were prohibited from making use of any British port 'as a station or place of rest for any warlike purpose or for the purpose of obtaining any facilities of warlike equipment'; and any warship or privateer entering a British port was permitted to take on board only sufficient supplies for the subsistence of the crew and sufficient coal to reach the nearest home port, with at least 3 months elapsing between resupplying at British ports.

In the event there was very little Confederate privateering. Overall, letters of marque were issued to 28 sailing vessels and to 24 steamers including two submarines, some 33 of those being in 1861, with much smaller numbers in 1862 and 1863, and none at all in the last 2 years of the War. Most of the prizes taken were brought into New Orleans and were adjudicated upon by Judge A B Magrath, previously a federal judge in Charleston. Confederate privateers captured by the Union were initially condemned as pirates by the courts[34] or guilty of acts of treason,[35] but the defendants were spared the death sentence and piracy trials abated thereafter. The Union itself did not engage in any privateering despite various attempts to persuade Lincoln to adopt that strategy. In March 1863 Congress did indeed pass the Privateering Act, but no letters of marque were ever issued.

Of some interest is the development of the law of prize during the Civil War. The law of nations recognised the right of a nation to impose a blockade of enemy ports in time of war and to seize neutral vessels breaking the blockade. However, a blockade was lawful only if it was effective. There were initial challenges to the legality of the Union blockade of southern ports on two grounds. First, there was no 'war' but only an insurrection, an argument boosted by the Union's own classification of the events. That was rejected by the majority of the Supreme Court in the *Prize Cases*, a 5:4 split on party lines.[36] Secondly, the blockade was invalid in that it was both ineffective and in that it had not been duly notified to neutral vessels. The Supreme Court disposed of these objections in *The Circassian*[37] and *The Peterhoff*[38] respectively. Unsurprisingly there was copious case law on the question whether a vessel was actually attempting to run the blockade or merely in the vicinity to see whether the blockade had been lifted, or by reason stress of weather or poor navigation.[39]

Perhaps the most important development was the extension by the US Supreme Court of the principle of continuous voyage as recognised by Britain

34 *United States v Baker*, 2 Fed Cas 962 (SD NY, 1861); *United States v Smith*, 1 ED Pa 516 (1861).

35 *United States v Greathouse* 4 Sawy 457 (ND Cal, 1863).

36 67 US (2 Black) 635 (1862).

37 69 US (2 Wall) 135 (1864).

38 72 US (5 Wall) 28 (1866).

39 Eg: *The Admiral*, 70 US (3 Wall) 603 (1865); *The Herald*, 70 US (3 Wall) 768 (1865); *The Diana*, 74 US (7 Wall) 354 (1868).

during the Napoleonic Wars. The difficulty faced by the Union was that the British-owned ports of Bermuda, Havana and Nassau were no more than 3 days sailing to the blockaded southern ports.[40] Goods could be transported to them from Britain in British vessels, a voyage of some 20 days. On arrival the goods could be left in port, and then, when the opportunity to run the blockade arose, loaded onto a specially designed blockade-runner capable of slipping through undetected at night. Plainly a blockade-runner could be arrested, but there was no established means of preventing British goods being transported from Britain to a British port on a British vessel without infringing every concept of neutrality. The Supreme Court was nevertheless up to the job. In a series of decisions, the Supreme Court ruled that the continuous voyage principle could apply both to the neutral outward leg and to the blockade-busting inward leg, and that the test was not whether the vessel was actually breaking the blockade but whether it intended to do so. That reasoning allowed the Supreme Court to accept the validity of arrests of British vessels carrying British cargoes from Britain to a British ports in the Caribbean.[41] By so doing, the Supreme Court effectively allowed the Union navy to enforce a blockade not at the entrance to the port but on the High Seas.

VII The Confederate cruisers

The Confederate strategy to attack Union trade had three separate strands; privateering that targeted Union vessels and cargoes; a programme of shipbuilding to establish a public navy capable of causing devastation to Union trading vessels; and acquiring vessels — blockade-runners — designed to evade the Union blockade so that southern trade could be maintained. Privateering in its traditional form was, as already seen, of limited impact, both because of an absence of merchant vessels suitable to be converted into privateers and because it was all but impossible to find a venue to hold a prize court. Shipbuilding was also effectively ruled out. The only shipyards in the seceded states were in Pensacola and Norfolk, the latter having been damaged by fire on 19 April 1861, 2 days after the secession of Virginia. It thus became necessary to look elsewhere. There were attempts to negotiate with France, but these foundered when funding proved to be impossible to secure. That left the shipyards of Liverpool and Glasgow.

The events of the next 2 years have generated a mass of published literature.[42] The Confederacy assembled a small team of agents in Liverpool, headed by James Dunwoody Bulloch, to secure vessels from British yards. Finance was provided by Fraser, Trenholm & Co, the Liverpool subsidiary of

40 The Mexican port of Matamoras, a short trip to Brownsville, Texas, was even more convenient.

41 *The Hart*, 70 US (3 Wall) 559 (1865); *The Bermuda*, 70 US (3 Wall) 514 (1865); *The Pearl*, 72 US (5 Wall) 574 (1866); *The Springbok*, 72 US (5 Wall) 1 (1866); *The Peterhoff* (n 38).

42 For a flavour, see: Frank J Merli, *The Alabama, British Neutrality, and the American Civil War* (Indiana University Press, 2004); Tom Bingham, 'The Alabama Claims Arbitration' (2005) 54(1) *International and Comparative Law Quarterly* 1; Stephen Fox, *Wolf of the Deep*: *Raphael Semmes and the Notorious Confederate Raider CSS Alabama* (Alfred a Knopf, 2007); Renata Eley Long, *In the Shadow of the Alabama: The British Foreign Office and the American Civil War* (Naval Institute Press, 2015).

Fraser & Co, a substantial commercial house based in Charleston with links to New York bankers Trenholm Brothers. The problem for Bulloch, who arrived in Liverpool in June 1861, was the *Foreign Enlistment Act 1819*. He quickly made contact with Liverpool solicitor Frederick Hull of Fletcher, Hull and Stone. With the advice of two leading counsel, a scheme was developed to overcome the legislation, based upon three propositions: equipping a vessel outside British territory was lawful, irrespective of intent; equipping a vessel within British territory was lawful if it was not done with intent to cruise against a friendly state; and building a vessel within British territory was lawful irrespective of her intended use. It was thus lawful to build a vessel in a British shipyard, to take her overseas and then to equip and crew her. To avoid unwanted attention from Union spies watching British shipyards — notably those run by Thomas Haines Dudley, who arrived in Liverpool in November 1861 — the Confederate interest in the building of the vessels was disguised.

In the event, Bulloch engineered the manufacture and escape of two vessels, The Oreto, later to become The Florida, in March 1862, and The 290, later to become The Alabama, in July 1862. Just how these vessels were built, and how close they came to being stopped, is the subject of copious literature. Every manner of subterfuge was adopted.

The Oreto was commissioned by Bulloch from Miller & Co, for construction in Liverpool. Bulloch spread the rumour that the vessel had been commissioned by the Italian Government. Dudley, through spies watching the Birkenhead shipyards, was convinced otherwise and reported his fears to the US consul in Britain, Charles Adams. Those fears were conveyed to the authorities, but they saw no need for intervention. The vessel as constructed was pierced for guns but was not armed and was cleared for departure. Despite a message from the Italian foreign minister denying all knowledge of the vessel, no attempt was made to stop her sailing. She headed directly for the Bahamas. She was there detained but was released by order of the Vice-Admiralty Judge of the Nassau Admiralty Court, John Campbell Lees. He ruled that the *Foreign Enlistment Act 1819* could be broken only if there had been fitting out in Nassau, but he found that any fitting out had occurred in England and so there was no basis for detention even though there was a strong suspicion that neutrality had been infringed. The Oreto sailed from Nassau on 7 August 1862, with a small crew and no armaments. She immediately had a rendezvous with another vessel that had been sent from England carrying arms and a full crew, at which point she was armed and crewed, and raised the Confederate flag under the name The Florida. Thus began a 2-year career of cruising against Union vessels.

The events surrounding the sailing of The Alabama were even more convoluted. Bulloch signed a contract with Laird Brothers in August 1861 for the building of a wooden merchant vessel, albeit one pierced for cannons. The work was carried out under conditions of strict secrecy. Dudley was nevertheless on the case, and from 15 May 1862 sent letters to Adams amongst others stating that there was conclusive evidence that The 290 was being constructed as a Confederate warship. Correspondence between Adams and Foreign Secretary Lord John Russell included demands for action. On 25 June 1862 Russell sought an opinion from the junior law officers,

Solicitor-General William Atherton and the now promoted Attorney-General Roundell Palmer, who responded that if there was evidence of fitting out then the 1819 Act would arguably have been infringed, although it was unclear whether the legislation prohibited fittings that had both benign and hostile use.[43] On 21 July a solicitor retained by the Union demanded seizure of the vessel and presented six depositions from either spies or individuals involved in the construction of the vessel. Three further depositions were provided in the following days. On Friday 26 July the papers were sent to Atherton, Palmer and the most senior of the law officers, Queen's Advocate Sir John Harding. Their opinion was delivered on the morning of 29 July, recommending the arrest of The 290. However, it was too late: earlier that morning she had set off for a trial run with a party of ladies and gentlemen, but they were transported back to shore and the vessel instead headed for Moelfra Bay in Wales. She was there searched but allowed to depart the following day. She reached the Azores, and had a rendezvous with another vessel cleared from Liverpool with guns, officers and crew. The Confederate flag was raised on the renamed The Alabama on 24 August 1862 and her cruising career began immediately. Much attention has focused on the reasons for the delay of the law officers in producing their opinion. The received wisdom was that Harding was suffering from temporary insanity and was unable to act, although other versions put Harding on a fishing trip in Wales, suggest that the British Government was complicit and ensured that the matter was delayed[44] or that the documents were intercepted by Confederate agents.[45]

The modus operandi of the Confederate cruisers demonstrates the desire of the Confederacy to adhere to established principles as far as possible. Prizes were legitimate under the law of nations only if the vessel was condemned in a prize court. However, the cruisers had nowhere to take their captures, and so they improvised. The captain of The Alabama, Ralph Semmes, was a trained lawyer and on effecting a seizure he converted his own vessel into a prize court and — with the aid of law texts — made an adjudication. If the vessel and cargo belonged to the enemy, Semmes would take cargo of any worth, conduct a valuation of the rest along with the vessel (so that a bounty could be claimed from the Confederate Government) and then burn them. If the vessel was enemy but the cargo neutral, the vessel would be released so as to preserve the neutral cargo, but on the strength of a bond applicable to the vessel that was to be called in at the end of the War and enforced in the courts of the new Confederate nation. Unsurprisingly, once the activities of the cruisers became known, most Union vessels abandoned the US flag in favour of that of Britain.

The career of The Florida came to an end on 7 October 1864 when she was captured. She sank a month later. Her tally was: 12 ships (10 destroyed,

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43 So held in *United States v Quincy*, 31 US (6 Pet) 445 (1832), but there was no English authority.

44 Caleb Cushing, *The Treaty of Washington: Its Negotiation, Execution and the Discussions Relating Thereto* (Harper and Brothers, 1873); Ephraim Douglas Adams, *Great Britain and the American Civil War* (Longmans, Green, 1925).

45 (1893) 94 *Law Times News* 490 suggests that Confederate agents intercepted Harding's opinions after they had been dispatched from a rural post office in South Wales. By this account Harding was on a fishing trip.

2 bonded); 6 brigs (all destroyed); 10 barks (all destroyed); 1 steamer (destroyed); and 4 schooners (2 destroyed, 2 bonded). The total worth of those vessels was some $4,151,000. The exploits of The Alabama were terminated off Cherbourg on 19 June 1864 in a suicidal encounter with The Kearsarge. The Alabama's tally of 69 was made up as follows: 35 ships (29 destroyed, 5 bonded, 1 released); 5 brigs (4 destroyed, 1 bonded); 18 barks (17 destroyed, 1 released); 1 steamer (bonded); 9 schooners (7 destroyed, 1 bonded, 1 seized); and 1 gunboat (destroyed). The total value of the vessels seized or destroyed was to be estimated at $4,792,000.

The events concerning The Florida saw the end of successful Confederate shipbuilding in Britain. The Alexandra was constructed in Liverpool, but on the advice of the law officers was arrested on 6 April at Toxteth dock while still incomplete and incapable of undertaking a voyage. A farcically convoluted prosecution under s 7 of the *Foreign Enlistment Act 1819* — *Attorney General v Sillem*[46] — followed, the prosecution led by Palmer. The Court of Exchequer Chamber was equally divided. Pollock CB and Bramwell B applied *The Santissima Trinidad*[47] in holding that there was no objection to the manufacture of a commodity such as a warship and that her arrest had been at a time when she was unfit to sail, whereas Channell and Pigott BB focused on the need to construe the legislation in a meaningful fashion and to focus on the intentions of those involved. Pigott B withdrew his judgment to facilitate an appeal to the House of Lords, but that device was rejected on jurisdictional grounds[48] and the outcome was a stalemate described by Adams in a letter dated 8 April 1864 as a 'spectacle of ... utter inefficiency ... There never was such a comedy performed on a grave subject in the whole history of the law.' The good news for the Union was although The Alexandra was released and sailed to the Bahamas, she was again arrested and the proceedings remained outstanding when the War came to an end.

The Confederate approach at this point shifted from seeking to construct warships to seeking to buy up and convert dilapidated British warships and transporting them outside the jurisdiction for arming and crewing. The British warship The Victor underwent that transformation into The Rappahannock, although the vessel was arrested in port in Calais and the official responsible for the sale was prosecuted — albeit unsuccessfully — under the 1819 Act in *R v Rumble*.[49] From that point on, no further sales of British warships were made. In *R v Jones*[50] there was a prosecution in respect of The Georgia, a nondescript iron steamer refurbished in Glasgow and then taken to Brest at which point the crew — who had been hired for a voyage to Singapore — were addressed by a Confederate officer and asked to volunteer for Confederate service. She thereafter had a short cruising career, accounting for 7 ships (5 destroyed, 2 bonded) and 2 barks (both destroyed). The prosecutions succeeded on the basis that the key events in equipping the vessel had occurred in England. The Georgia was fated to sail into the annals of

46 (1863) 2 H & C 431; 159 ER 478.
47 *The Santissima Trinidad* (n 27).
48 *Attorney-General v Sillem* (1864) 10 HL Cas 704; 11 ER 1200.
49 (1864) 4 F & F 175, 176 ER 519.
50 (1864) 4 F & F 25; 176 ER 450.

marine insurance. She was after the war purchased by a British merchant who chartered her to the Portuguese Government. She was arrested by the US authorities and condemned in proceedings that reached the US Supreme Court,[51] but the owner's insurance claim was dismissed in the landmark case of *Bates v Hewitt*[52] on the basis that there had been a duty to disclose to the underwriters the history of the vessel and that merely giving them her name was not — despite her notoriety — enough to put them on notice that there might be an arrest.

One other vessel was of significance to later events. The Shenandoah, previously The Sea King, had been built in Glasgow as a merchant vessel, lightly armed for self-protection. She was purchased by Confederate interests and armed off Madeira in October 1864 using the usual rendezvous device. Having taken some prizes, she arrived at Melbourne in January 1865. Under British neutrality principles she should not have been allowed to stay in port, but she was delayed by the need for repairs and while there a crew was recruited. She departed in February 1865 and headed for the Arctic where she laid waste to about one-third of the Union whaling fleet. Unknown to her crew, at the time these losses were inflicted the War had come to an end. The losses were valued at some US$6,000,000. Those responsible for recruiting the crew were prosecuted under the 1819 Act in *R v Corbett*,[53] but the jury was not satisfied that the relevant acts had occurred in Britain.

VIII The Alabama arbitration

The escapes of The Florida and The Alabama had led to immediate calls by Adams for compensation. Matters lay in abeyance until the end of the War, when by letter to Russell dated 9 May 1865 Adams listed nine complaints of infringement of neutrality and demanded compensation for letting the cruisers loose. The political machinations of the following years will not be traced here. It suffices to say that the cession of Canada was at one time thought to be the price at which the US would be bought off, and in November 1868 the two nations agreed in the Johnson–Clarendon Treaty that monetary claims could be resolved by arbitration. However, that was scuppered by a fiery speech to Congress by Senator Charles Sumner on 13 April 1869, in which he demanded compensation of US$2.15 billion, represented by $15 million for damage to vessels (the 'direct' claims), $110 million for the increased cost of insurance premiums and loss of trade by the transfer of vessels from US to neutral flags and the balance for the prolongation of the War (the 'indirect' claims). As a result, the Treaty was rejected by 54 votes to 1.

In what was seen as something of an admission of culpability, a review of the *Foreign Enlistment Act 1819* was established. The report of the Neutrality Commission, whose members included Palmer, was presented to the House of Commons on 28 May 1868. This recommended significant tightening of the legislation, which occurred with the passing of the *Foreign Enlistment*

51 *The Georgia*, 74 US (7 Wall) 32 (1868).
52 (1867) LR 2 QB 595.
53 (1865) 4 F & F 555; 176 ER 689.

Act 1870.[54] The revised measure for the first time outlawed, in s 7, building a ship 'with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state'. Prolonged negotiations led to the appointment of a joint commission to agree a procedure for the resolution of the claims. After 37 meetings in the spring of 1871, the *Treaty of Washington* was agreed then ratified by Britain in June and the US in July.

The Treaty established a Tribunal of Arbitration, certainly the first of its type and regarded by practitioners of international arbitration as a landmark in the development of their craft.[55] There were to be five arbitrators, one from each nation (Cockburn CJ[56] from Britain and Charles Francis Adams from the US) plus three nominated by neutral governments. The King of Italy nominated Count Federico Sclopis, then aged 74 and a distinguished politician, lawyer and author of legal and historical texts, held in high regard by all who encountered him. The Swiss President appointed Jacob Staempfli, the youngest member of the Tribunal at 51, and a Swiss lawyer and radical politician, later to become President of the Swiss Confederation on three separate occasions. Finally, the Emperor of Brazil's nominee was Baron d'Itajuba, a Professor of Law-turned-diplomat and Brazilian Minister to France at the time of his appointment. The seat of the arbitration was Geneva. Their terms of reference were the most contentious of the matters resolved by the *Treaty of Washington*. Three rules were to be applied to determine Britain's liability:

> A neutral government is bound —
>
> First, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.
>
> Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.
>
> Thirdly, to exercise due diligence in its own ports and waters, and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

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54 Still partly in force. The weaknesses of the old law had, just before the measure was passed, become apparent in *R v Carlin* (1870) 6 Moo PCCNS 509; 16 ER 818.

55 Bingham, 'The Alabama Claims Arbitration' (n 42), reprinted in Tom Bingham, *Lives of the Law: Selected Essays and Speeches 2000–2010* (Oxford University Press, 2011) 13; VV Veeder, 'The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator' in David D Caron et al (eds), *Practising Virtue: Inside International Arbitration* (Oxford University Press, 2015); Malcolm Holmes, 'Maritime Arbitration Old and New' (Australian Maritime and Transport Arbitration Commission, Sydney, 7 September 2016).

56 Sir Alexander Cockburn, a distinguished judge, had presided over the prosecutions under the 1819 Act and had been fiercely critical of infringements of neutrality. That point is worth bearing in mind in the light of later events.

Britain refused to recognise these rules as accurate statements of principle of the law of nations, but acceded to them for the purposes of the arbitration. Counsel for Britain was none other than Roundell Palmer.

The entire procedure came close to collapse before it had even started. The *Treaty of Washington* had been opaque as to whether the Tribunal was to consider only the direct claims or whether indirect claims could be pressed. When the US presented its eight-volume case on 15 December 1871 it included both direct and indirect claims. Britain objected strongly, but diplomatic activity saw a stitch-up the evening before the first scheduled day of the hearing whereby it was agreed that the Tribunal would issue a preliminary statement — not in the form of an award — that the indirect claims did not form a part of international law and would not be considered.

The Tribunal held its first hearing on 27 June 1872. On 14 September a majority award was signed by Adams, Count Sclopis, Staempfli and d'Itajuba, and was presented to the two Governments at the Hall of Conferences in Geneva at the final open door session at 12:30pm on Saturday 14 September 1872.[57] Cockburn CJ refused to sign the award, and produced a dissent of extraordinary legal and factual complexity, although it was not in the form of a minority award but rather a lengthy discourse entitled *Reasons of Sir Alexander Cockburn for Dissenting from the Award of the Tribunal of Arbitration*.[58] It did not form a part of the official record of the arbitral tribunal, but the Tribunal ordered it to be appended to the Protocols of the arbitration without having had the opportunity to read it: had they done so, it is likely that they would have disowned it. The dissent was in due course published in a supplement to the *London Gazette* on 24 September 1872. The formality of the closing ceremony was for the most part dignified and courteous, a mood apparently broken by Cockburn CJ who is reported as having 'rushed to the door and disappeared, in the manner of a criminal escaping from the dock'.[59]

The majority award found that the British Government was culpable in respect of the direct losses inflicted by The Florida, The Alabama and The Shenandoah. It is to be noted that liability was based upon the three rules in the *Treaty of Washington*, and it was no part of the findings of the Tribunal that Britain had infringed the neutrality rules of the law of nations or had failed to enforce its own domestic law under the *Foreign Enlistment Act 1819*. As regards The Florida the infringements related to: the construction of the vessel; her stay at Nassau and her judicial acquittal; and stops at other British ports. As regards The Alabama, the infringements related to: failure to respond to warnings and permitting her escape from Britain; failure to chase and capture her after her escape; and allowing her into British ports for refuelling. As regards The Shenandoah, the infringements related only to events at Melbourne, allowing the vessel to be augmented, crewed and given a quantity of fuel that could only have been used for cruising. The total sum awarded was $15,500,000. It suffices to say of Cockburn CJ's dissent that he rejected the three principles upon which the *Treaty of Washington* was founded, and agreed

57 Protocol XXXII.

58 *London Gazette* (24 September 1872) Supplement.

59 Cushing (n 44) 128.

only with the finding of liability for The Alabama. He also asserted that, even if the majority was correct, the total liability should be only $10,121,044, as the Tribunal's figure involved a degree of double counting, in particular in that it assumed that there were no insurance recoveries. Despite Cockburn CJ's analysis, the British Government was bound by the Treaty to honour the award, which it did to a mixed press reception. Across the Atlantic views also divided between triumph and capitulation.

IX The application of the Alabama award

The award of $15.5 million was in respect of direct losses only. The US did not in fact receive that sum. It was reduced by $1,929,819 representing losses to British interests for illegal practices under the blockade, and by a further $5.5 million as compensation for lost fishing rights. The net $8 million may in fact have been no more than a pyrrhic victory given the decline in the value of the US bond market from constant threats of war against Britain from 1865 onwards. Nevertheless, the full amount of the award was available to those who had suffered losses, and criteria for the allocation of those sums and the means of distribution were laid down by an Act of Congress passed in June 1874.[60] The Act created the Court of Commissioners of Alabama Claims, consisting of five judges. Those allegedly suffering loss were required to establish their claims before the Court to the usual legal standard of proof. Hearings began on 22 July 1874 and applicants were given 6 months from that date to file claims, although that period was later extended. After some years of work, the figure awarded by the Court amounted to $9,316,120.25. With over a third of the sum remaining — and it is of interest to note that the sum was far closer to Cockburn CJ's estimate than that of the majority of the Tribunal — the US Government chose to renew the life of the Court by a further Act of Congress passed on 5 June 1882 and to extend its jurisdiction to specified classes of indirect claims, including losses inflicted within 4 mi of the coast and the cost of increased insurance premiums. The Court closed for business by an Act of Congress dated 2 June 1886.

The Court's terms of reference for the first round of direct confined it to loss of physical property inflicted by the three named cruisers, with no recovery for loss of profits. The Court itself permitted crew claims for loss of wages for up to a year, but excluded personal injury claims. It also adopted rules of causation, so that vessels that ran aground in an attempt to escape the attentions of the cruisers were not compensated. Under the 1874 Act, claimants who did not owe allegiance to the US or who had rebelled were excluded. Most importantly, the Court ruled that British citizens could not benefit from the fund. However, there was an important exception, laid down in the Court's ruling in *Rodocanachi v United States*.[61] The applicant was a naturalised British subject with a shareholding in a company based in Italy but

60 Much valuable information on the operation this measure may be found in the *Report from the Secretary of State, with Accompanying Papers, Relating to the Court of Commissioners of Alabama Claims* (1877). Decisions under the legislation as renewed in 1882 can be found in JF Manning, *Opinions of the Court of Commissioners of Alabama Claims* (Smith and Porter, 1884).

61 The decisions of the Court are not officially reported, but are collected in Manning (n 60).

with branches in London, Marseilles and Odessa. His claim for loss of a cargo of tobacco was allowed on the principle that the rights of British naturalised citizens were not under English law protected outside the dominions of the British Crown. Thus, for present purposes, Mr Rodocanachi was a non-British foreign national and the cargo was under US protection. It may be noted in passing that the Court adopted a more liberal approach to claims under the 1882 Act, and in *Cassidy v United States* ('*Cassidy*')[62] it was decided that British subjects could after all benefit from the fund.

X The insurance issues

Any reader of the above will immediately have wondered how all of this fitted in with the insurance position. The vast majority of the losses were covered by insurance, and much of it was placed in London. Indeed, one of the heads of loss subsequently allowed was the enhanced cost of insurance premiums during the War, and the indirect claims as originally presented in the US case to the Tribunal included the flow of insurance premiums to Lloyd's and other London market insurers.

The 1874 Act contemplated the existence of insurance. Section 12 of the 1874 Act set out three basic principles for insurance recoveries: (1) no claim was payable if the claimant had received insurance moneys; (2) if insurance moneys had been received, only uninsured loss was recoverable; and (3) claims by insurers, either by way of subrogation or assignment, were not admissible. The legislation did not come into force for some 9 years after the end of the Civil War, and it may safely be assumed that any insurance claims would have been long settled by that time. However, the prohibition on subrogation actions failed to recognise the importance of the use of valued policies in the marine market. Assume a policy for £6,000 and a loss of £10,000. All was well and good if the policy was unvalued: the assured could recover £6,000 from the insurers and thus could claim from the fund the £4,000 of his loss not covered by the policy. As against the insurers, the assured was entitled to retain that sum on indemnity principles. However, most marine policies were valued. Take the case of an assured with a valued policy of £6,000 on property worth £10,000, under which, following a total loss the assured was paid up to policy limits of £6,000. As between the assured and the insurer there was no further loss, because the £6,000 valuation was conclusive, but for the purposes of a claim against the fund there was a shortfall of £4,000 'actually suffered. So the assured would have been free to pursue a claim against the fund. The fund did indeed pay out in those circumstances. The question raised but not answered by s 12 was whether the insurers had a right to recoup that £4,000 from the assured. If they could, then they would sidestep the restrictions in s 12 and at the same time deprive the assured of full recovery for damage actually suffered.

The sole reported attempt by the London market to recover the sums payable under the Washington Convention was *Burnand v Rodocanachi* ('*Burnand*').[63] It is not apparent from the judgment itself, but this was almost

62 See ibid.

63 *Burnand* (n 8). Cohen QC, one of the counsels for the underwriters, was co-counsel with

certainly a test case: if the claim had succeeded, it could well have led to others. The insurance related to the tobacco lost following the sinking of the Union merchant vessel, 'Lamplighter', by The Alabama, on a voyage from New York to Genoa. There were two valued policies, each for £7,500. The underwriters paid the sum insured, £15,000, for a total loss. The cargo was underinsured to the tune of £6,557 7s 3d and so Rodocanachi and the other defendants — although fully paid under the policy — nevertheless suffered a real loss. They were successful in recovering the sum of £2,803 17s 2d, from the Alabama fund (a sum net of the heavy expenses and commissions incurred) on the very basis that the insurance did not cover their actual loss. In the present proceedings, the underwriters laid claim to it. As seen above Rodocanachi squeaked home in his claim against the fund, and it must have been galling for him to discover that, having successfully negotiated the Alabama fund claims process, his payment was the subject of a demand from his insurers.

The insurers' claim was allowed at first instance by Lord Coleridge CJ, on the principle that under a valued policy the agreed value was conclusive. The only possible ground upon which subrogation could be denied was that the payment out of the fund was, in his phrase 'merely a free gift of the money, a mere act of grace on the part of the United States Government'. He saw some support for that contention, in that the money originated from the sums paid by Britain to the US under the arbitration award and there was authority for the proposition that sums paid by one sovereign state to another by way of war reparations gave no right of claim by the subjects of the receiving state.[64] It followed that where the receiving state chose to make payment to its citizens, it did so voluntarily. However, Lord Coleridge CJ was of the view that if the receiving state chose to distribute the fund by 'regular process' then, although subjects might not have any legal right to claim, the fund was impressed with 'a character of moral equity' and was held on trust for potential claimants. That was, in Lord Coleridge CJ's opinion, the basis of *Randal*[65] and *Blaauwpot*.[66] Lord Coleridge CJ also pointed to the incongruity that would have arisen from a contrary decision: if the assured had been paid out of the Alabama fund before the insurers had been called upon to indemnify the assured, their liability would have been reduced by the amount of that payment, and it was difficult to see why the insurers should bear the risk where they happened to have paid first.[67] Finally, it was irrelevant that a US

Sir Roundell Palmer at the Alabama arbitral tribunal hearing.

64 *Rustomjee v The Queen* (1876) 2 QBD 69, a judgment given by Lord Coleridge CJ himself. This was a claim by a British national, who claimed that he was, in 1838, owed substantial sums by a Chinese merchant. The First Opium War between Britain and China, over trading rights, was brought to an end in 1842 by the *Treaty of Nanking* under which the Emperor of China agreed to pay to the Crown $3,000,000 dollars 'on account of debts owed to British subjects'. Those debts had been incurred as a result of the confiscation by the Chinese authorities of substantial quantities of opium and the blocking of trade. The Court ruled that the applicant had no claim against any part of the proceeds.

65 *Randal* (n 9).

66 *Blaauwpot* (n 10).

67 This is an error. If it was right that the sums paid out of the Alabama fund were not paid by way of gift or grace, they would have to be left out of account in any insurance claim. So the order of payment made no difference.

court would almost certainly have dismissed the claim: US public policy could not affect the rights of litigants in the English courts.

The decision was reversed by a 2:1 majority of the Court of Appeal (Bramwell and Brett LJJ, Baggallay LJ dissenting). For Bramwell LJ, the lower court had not addressed the essential question, namely, whether the Alabama fund payment was one that reduced the insured loss. It plainly did not: the money was paid solely because the assured was underinsured, and the assured was entitled to retain it. Brett LJ agreed. Baggallay LJ, by contrast, agreed with Lord Coleridge CJ and ruled that the facts were indistinguishable from *Randal* and *Blaauwpot*.

At this point an irony may be noted. After the decision of the Court of Appeal had been handed down, the Court of Commissioners of Alabama Claims was called upon to resolve the question whether the proceeds from the Alabama fund paid to an insolvent claimant passed to the relevant statutory insolvency administrator (the trustee in bankruptcy in the case of an insolvent individual) or whether the proceeds could be retained by the bankrupt on the basis that they were no more than a bounty or gift. The Court, relying upon the first instance judgment of Lord Coleridge CJ and the dissenting judgment of Baggallay LJ, held that the sum was not a bounty but formed a part of the bankrupt's estate and thus passed to the trustee in bankruptcy. The Court specifically refused to follow the majority ruling in the Court of Appeal. This ruling appears not to have been referred to in the subsequent proceedings in England.

A unanimous House of Lords, consisting of Lords Selborne, Blackburn, Watson and Fitzgerald,[68] upheld the decision of the Court of Appeal and disallowed the claim. It is noteworthy the leading and most detailed judgment was given by Lord Selborne, the peerage title of Roundell Palmer who had been elevated to the role of Lord Chancellor under Gladstone in 1872, having initially turned down the role in 1868 on the re-election of a Liberal government following the brief Tory interregnum of Derby and Disraeli in 1867. As we have seen, Palmer was Solicitor-General under Palmerston between 1861 and 1863 when he was required to give advice as to whether The Alabama should be allowed to sail, served as Attorney-General under Palmerston and then Russell from 1863 to 1866, had been instrumental in bringing about agreement on the Washington Treaty and was British counsel to the Alabama arbitration. Nobody had been more involved in the key decisions relating to British neutrality, to the commissioning of Confederate vessels and to the resolution of US claims after the Civil War.

The outcome was never in doubt. The House of Lords proceeded to judgment without the need to hear arguments in rebuttal by the assured. However, there was no consistent analysis. Lord Selborne disposed of the case on the simple ground that the valuation in the policy was not conclusive as to the extent of the loss for present purposes, and that the assured had suffered uninsured loss represented by the payment by the Alabama fund. The payment out of the fund was predicated on the assumption that there was uninsured loss, and the 1874 Act had taken every possible step to ensure that the

68 The usual convention of the House of Lords in sitting with five members of the court was not followed in this case.

payment was for the benefit of the assured and not insurers. The right to payment arose solely under the Act, and the right was limited to uninsured loss. It was accordingly akin to a voluntary gift by an individual. As for *Randal* and *Blaauwpot*, those cases were distinguishable because the payment by the Crown did not exclude insurers, and in the absence of an exclusion for insurers in the 1874 Act those cases would probably have been applicable. To summarise the point, the specific exclusion of insurers from the 1874 Act demanded the classification of the payment as a gift in respect of uninsured loss. Lord Blackburn treated the payment out of the Alabama fund as voluntary, and although he regarded the payments under the 1741 Royal Proclamation in the same light, he distinguished the earlier cases on the ground that the payment in them was designed to diminish the insured loss and thus available for the benefit of insurers whereas that in *Burnand* was not designed to reduce insured loss.[69] Lord Blackburn agreed with Lord Selborne that the notion that the valuation under a valued policy was conclusive, and although he expressly reserved his position on the correctness of *The North of England Iron Steamship Insurance Association v Armstrong*[70] — although again that appears to be in the context of the suggestion that a subrogated insurer could recover or retain more than it had paid — he found it unnecessary to consider the ruling in any detail. Lord Watson dismissed the appeal on the grounds that the sum payable out of the Alabama fund did not go to reduce insured loss, by way of contrast to *Randal* and *Blaauwpot*, and in any event the payment was an act of grace. Finally, Lord Fitzgerald adopted the reasoning of Lord Selborne although he then went on to provide yet another reason why there was no recovery in the present case: this was a claim by the insurers for the restoration of sums to which the assured was not entitled,[71] but under the 1874 Act of Congress the assured was entitled to the money.

Burnand has subsequently never been applied to defeat a subrogation claim. The point arose again in *Stearns v Village Main Reef Gold Mining Co Ltd* ('*Stearns*'),[72] in circumstances closely analogous to those in *Burnand*. The Transvaal region of South Africa, populated by the indigenous Zulu tribes and the Boer Dutch settlers, was annexed by the British Empire in 1877. The discovery of diamonds in the region in 1866 made the region particularly attractive to the Empire. However, it proved impossible for Britain to exert

69 To support this analysis, Lord Blackburn cited *Godsall v Boldero* (1809) 9 East 72; 103 ER 500 ('*Godsall*') a case involving a life policy taken out by a creditor on the life of his debtor. Parliament voted on a 'grace and favour' basis to pay the discharge the debts of the debtor, and it was held that the insurers were discharged from liability because the payment had gone to reduce the insured liability. The voluntary nature of the payment was thus irrelevant. *Godsall* was overruled in *Dalby v India & London Life Assurance Co* (1854) 15 CB 365; 139 ER 465 ('*Dalby*'), on the separate ground that life policies were not indemnity contracts and accordingly the assured in *Godsall* was fully entitled to aggregate sums from both insurance and non-insurance sources. *Dalby* turned on a different point, namely that the non-indemnity nature of a life policy meant that the policyholder did not have to show any interest in the life of the life assured at the date of the life assured's death.

70 (1870) LR 5 QB 244.

71 Then classified as an action for 'money had and received', but these days regarded as a restitutionary claim to prevent unjust enrichment.

72 (1905) 10 Com Cas 89 ('*Stearns*').

autonomy. Although the Zulus were defeated in 1879 after a series of battles, the Boers proved more resilient. The First Boer War proved to be a military disaster for the British, and on 23 March 1881 the British Government bowed to the inevitable and signed a truce that gave the Boers a substantial degree of self-determination under notional British supervision. The uneasy compromise broke down following the discovery of gold in Witwatersrand in 1886. Large numbers of Britons headed for the region, and the outsiders (*Uitlanders*) soon outnumbered the Boer population. Uitlanders were unsurprisingly denied voting and other political rights, but the spectacularly unsuccessful Jameson Raid in 1895 in their support failed to improve their lot. Demands by the British Government for such rights were rejected, and British refusal to withdraw troops from the Transvaal borders following an ultimatum on 9 October 1899 led to a war that lasted for the best part of 3 years. The Empire prevailed and the Union of South Africa, as part of the Empire, was created in 1902.

Village Main owned a gold mine. On 2 October 1899, shortly before the outbreak of the Second Boer War, the South African government seized gold to the value of £21,880 from the mine. The gold was insured at Lloyd's for £100,000. Village Main managed to persuade the Transvaal Government to pay the sum of £7,239 12s on the understanding that the mine would be kept open and that the gold obtained would be shared equally between the Government and Village Main. The underwriters, unaware of the payment, settled a claim for the gold as a total loss, and paid £21,880 in respect of it. Having discovered the payment, the underwriters asserted that the loss suffered by Village Main was £7,239 12s less than they had believed, and they commenced the present action to recover that sum. As in *Burnand*, this was not a subrogation claim in the strict sense, in that the underwriters were not seeking to recover from a third party the sum owing by the third party to the policyholder; this was a case in which the third party had paid in advance of the insurers. However, the question was precisely the same as that in a subrogation case: if the payment to Village Main had been designed to reduce its loss then the underwriters could assert that Village Main had recovered twice, but if the payment was in respect of uninsured loss or by way of personal compensation, then that payment could not go to diminish the sums owing for the loss of the gold. Village Main asserted that the payment was nothing to do with the gold seized, and amounted to a fresh contract under which payment was being made by the Transvaal Government for the working of the mine. That argument was rejected. Walton J at first instance, and the Court of Appeal held that the payment was designed to diminish the insured loss. Village Main had received a double indemnity and had to account for the overpayment. The Court of Appeal took *Burnand* as having decided that a sum designed to reduce the insured loss was to be taken into account whether or not it was a mere gift[73] *Burnand* itself was an exceptional case where the sums were returned by the US Government to cover uninsured losses, so that the insurance was in the mind of the donor: that was not the case in *Stearns*.[74]

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73 Vaughan Williams LJ would have preferred to discount all gifts, but felt that that conclusion was not open to him in the light of *Burnand* (n 8).

74 The unique nature of ibid was duly confirmed by the Court of Appeal in *Colonia*

It should also be said that the fate of Mr Rodocanachi himself was unlikely to have caused a diplomatic rift between Britain and the US. He had no connection with the US other than that his cargo was being carried on a Union vessel at the time of the loss and thus qualified because it was under US protection. His claim against the Alabama fund in the US had succeeded only because his status as a naturalised Briton did not confer upon him Crown protection outside British dominions and also because his company had its seat in neutral jurisdiction, Italy; the Court of Commissioners of Alabama Claim's subsequent adoption of a subsequent more generous approach to losses by British nationals in *Cassidy v United States*[75] would have allowed recovery by him without the need for the earlier more convoluted analysis in that Court's judgments. Had the underwriters succeeded in their claim — and the ruling of the Court in *The Bankruptcy Claims*[76] ironically pointed squarely to that outcome — the enforcement the English judgment against Mr Rodocanachi would not have been problematic because his company had assets in England. So the opposite result in *Burnand* might have raised the odd eyebrow in the US but little more. However, more importantly, success by the underwriters could potentially have led to claims in the English courts against US nationals with assets in England or with vessels on the high seas susceptible to arrest. It did not succeed, so we will never know whether the ruling in fact averted a serious diplomatic, and potentially a worse form of, breach between Britain and the US. It may be added that the ruling of the Court of Commissioners of Alabama Claims in *Cassidy* post-dated the ruling in *Burnand*. No mention of it is made in *Cassidy*, but the fact that the proceedings were known to the Court of Commissioners — which is apparent from *The Bankruptcy Question* ruling — perhaps prompted a more sympathetic view to claims by British subjects against the Alabama fund. What is clear is that the Alabama incident had ceased to be an issue between the two nations by 1882.

XI Where are we?

And so back to *Xu*. The early Spanish prize cases, and the ruling in *Stearns* make it clear beyond all doubt that the principle of indemnity: (a) entitles an insurer to refuse payment where the assured has earlier received indemnification for insured loss; and (b) confers a restitutionary claim on an insurer who has paid a loss to recover any sums subsequently received by the assured by way of reducing that self-same loss. In *Burnand* the assured was allowed to retain both the insurance payment and the compensation payment, on the apparent ground that the compensation payment did not go to reducing insured loss but was intended to pay for uninsured loss. However, that could be the case only if there was an exception to the rule that the valuation under

Versicherung AG v Amoco Oil Co [1997] 1 Lloyd's Rep 261 ('*Colonia*'), where Hirst LJ noted that *Burnand* turned on the finding that the sums paid were not in respect of the loss and so they could not reduce the loss. In *Colonia* the point was made that in the commercial setting it is to be presumed that payments made by a third party are designed to reduce the loss and thus are to be taken into account.

75 See n 62 above.

76 Ibid.

a valued policy was conclusive as between the parties. At the time of *Burnand* the principle of the conclusiveness of the valuation had been accepted for over a century, and permitted of only one exception, relating to constructive total loss.[77] But hardly anything was made of the point in the judgments of the House of Lords, other than the statement by Lord Selborne that the conclusiveness principle should not be applied on the facts. Does that make *Burnand* a 'political' decision? It is impossible to know what pressures were put on the members of the Court, and indeed what influence Lord Selborne had on his brethren. The two volumes of his *Memorials* published in 1896 and 1898,[78] otherwise detailed, are silent on the question.

Burnand is, therefore, at best an exceptional derogation from the ordinary indemnity principle, based upon the principle that a payment for uninsured loss cannot be treated as part of the indemnity. However, as noted at the outset, insurers have not sought to deny basic indemnity to the assignee of the proceeds of a property policy. It may be that the main reason for doing so is one of pragmatism: to do so would be to render damaged property unsaleable, and the adverse publicity would — particularly in the Christchurch context where insurer reputations are already low — be deeply damaging. However, the attitude of an insurer in run-off, or under pressure from reinsurers, could well be different. *Burnand* could assist policyholders in such circumstances if they could assert that the purchaser's payment was not to be treated as payment for the damaged building but rather for the land itself, which is excluded from standard covers. Alternatively, if there is underinsurance (which has proved to be all but universal in the Christchurch context) the argument would be that the purchase price is to be allocated on a 'recover down' basis, paying off uninsured loss first.[79] That said, it is difficult to resist the conclusion that it is self-restraint rather than legal principle that has caused insurers not to enforce their full subrogation rights and to allow the *Xu* litigation to proceed on what is probably a false premise.

77 The principle dates back to *Lewis v Rucker* (1761) 2 Burr 1167; 97 ER 769.

78 Roundell Palmer, *Memorials: Part I: Family and Personal: 1766–1865* (Macmillan, 1896); Roundell Palmer, *Memorials: Part II: Personal and Political: 1865–1895* (Macmillan, 1898).

79 *Lord Napier v Hunter* [1993] AC 713; *Falcon Insurance Co (HK) Ltd v Cheshire Cat Restaurant & Pub Co Ltd* [2007] HKEC 2084; *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* [2019] EWCA Civ 718.